8/8/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
GREAT LAKES DIVISION OF NATIONAL STEEL CORP.	)	Docket No. EPCRA-007-1991
	)	
	)	
Respondent	)	

ORDER DENYING COMPLAINANT'S MOTION
FOR PARTIAL ACCELERATED DECISION

For the reasons stated in a motion served April 8, 1991[1] (motion), complainant requests that an accelerated decision be granted in its favor on the issue of respondent's liability for violations of section 103(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(a), and section 304(a) of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11004(a). Respondent opposed the motion in its response of April 23. To be decided here is whether there exists a "genuine issue of material fact" concerning liability which would preclude the granting of the motion pursuant to 40 C.F.R. § 22.20(a). The respective arguments of the parties are well known to them and will not be repeated here except to the extent deemed necessary by this order.

[1] Unless otherwise indicated, all dates hereinafter are for the year 1991.

The Administrative Law Judge (ALJ) may look to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance in interpreting the Consolidated Rules of Practice of the Environmental Protection Agency (EPA). Here, the equivalent of an accelerated decision is Fed. R. Civ. P. 56 addressing a summary judgment. Summary judgments allow a final decision to be rendered without the time or expense of an evidentiary hearing, provided there are no genuine issues of material fact in controversy. Material facts are those which establish or refute an essential defense asserted by a party.[2] Although reasonable inferences may be drawn from the evidence, they must be viewed in the light most favorable to the party opposing the motion.[3] Here, an accelerated decision may not be granted because there remain genuine issues of material fact which warrant an evidentiary hearing.

The basic issue of fact which remains in controversy in Counts I, II, and III is whether respondent failed to notify immediately the respective national, state and local emergency response centers as soon as it had notice of its hydrogen sulfide release of a reportable quantity . Complainant supports its motion with phone logs indicating that respondent waited until 5:22 p.m. to alert the local authorities, 6:08 p.m. to notify the state authorities, and 5:30 p.m. to alert the national authorities on February 14, 1990. However, the respondent submitted an affidavit alleging that it

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[2] Words and Phrases, "Material Fact."

[3] United States v. Diebold, 369 U.S. 654, 655 (1962). See also, 6 Moore's Federal Practice ¶ 56.15[1-00].

notified the appropriate authorities between 10:00 and 10:30 a.m. on February 14, 1990. For the reasons stated in its July 22 response to the order of July 12, respondent relates in affidavit form the unavailability of underlying or corroborative documents in support of alleged telephone calls as related in paragraph "7" of Mr. Hartong's affidavit of March 26. Furthermore, regarding Count IV, whether respondent provided written notification to the state emergency response center (SERC) as its attachment two indicates or whether the appropriate department of the SERC received the notification is still at issue.

Although the burden rests on the motioning party to demonstrate there are no material issues of fact in controversy, here, complainant is requesting that the respondent's evidence be overlooked. It is well settled that for the purpose of summary judgment, once it is determined that there is an issue of material fact, the inquiry ends.[4] The ALJ is not empowered to resolve that issue or to weigh the evidence supporting each argument.[5] Even if the ALJ were convinced that complainant's motion were technically proper, "sound judicial policy and the proper exercise of judicial discretion" may permit the denial of the motion and allow the case to be fully developed at the hearing. Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979). This is such a case. The muddy waters have become murkier; credibility is crucial in this

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[4] Homan Mfg. Co. v. Long, 242 F.2d 645, 656 (7th Cir. 1957).

[5] Cox v. American Fidelity & Casualty Co., 249 F.2d 616, 618 (9th Cir. 1957).

proceeding. Truth can be best leached out in the sunshine of an evidentiary hearing.

IT IS ORDERED that:

1. The motion for accelerated decision be **DENIED**;

2. The parties continue in good faith settlement negotiations;

3. The parties arrange for a telephone prehearing conference for the purpose of scheduling a hearing date and location, if this matter is not settled by September 17.

Frank W. Vanderheyden
Administrative Law Judge

Dated: August 8, 1991

IN THE MATTER OF GREAT LAKES DIVISION OF NATIONAL STEEL CORP.,
Respondent,
Docket No. EPCRA-007-1991

Certificate of Service

I certify that the foregoing Order, dated 8/8/91, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Beverely Shorty
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region V
230 South Dearborn St.
Chicago, IL 60604

Copy by Regular Mail to:

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Marion I. Walzel
Secretary

Dated: August 8, 1991